HOPEWELL CONSTRUCTION CO. LTD.

v.

EASTERN & ORIENTAL HOTEL [1951] SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[ORIGINATING SUMMONS NO. C 78 OF 1984]
8 AUGUST 1986

CONTRACT: *Plaintiff entered into a contract with defendant for construction of building - Plaintiff a foreign company - Not registered in Malaysia as a foreign company under the provisions of Companies Act 1965 - Certain works carried out and paid for - Disputes between parties - Plaintiff prayed these disputes be resolved by arbitration if said contract valid - Defendant contended that contract not valid - Whether contract valid - Public policy - Companies Act, ss. 332, 349 - Contracts Act 1950, s. 24(b).*

This was an application by the plaintiff by originating summons seeking the order of the Court:

(1) for a declaration that the contract dated 11 May 1982 and entered into between the plaintiff and the defendant was valid and effectual until such time as it was properly determined by either party notwithstanding the fact that the plaintiff was at all material times a company incorporated under the laws of Hong Kong and was not registered as a foreign company pursuant to the provisions of the Companies Act 1965;

(2) that the plaintiff is entitled to request the president or the vice-president for the time being of the Pertubuhan Akitek Malaysia to nominate an arbitrator pursuant to the provision of Clause 34(1) of the conditions of the said contract, for the purposes of determining the disputes which have arisen between the parties.

The plaintiff is a company incorporated in Hong Kong. On 11 May 1982, the plaintiff entered into a contract with the defendant for the construction of a building in Penang. The plaintiff carried out certain works and was paid for the works carried out. Certain disputes then arose between the parties to the said contract.

The dispute before the Court was whether the said contract is void because the plaintiff, being a foreign company, did not register in Malaysia as a foreign company pursuant to the provisions of the Companies Act 1965. With regard to the other disputes between the parties, the plaintiff wishes that these disputes be resolved by arbitration as in prayer (2), if the Court holds that the said contract is a valid contract.

The defendant contended that s. 349 of the Companies Act which imposes a penalty for default by a foreign company in complying with, *inter alia*, s. 332 (which requires a foreign company to register itself with the Registrar of Companies within one month after it established a place of business or it commenced to carry on business within Malaysia) must be taken to imply a prohibition of all unregistered foreign companies from carrying on business in Malaysia and consequently to prohibit by necessary inference, all contracts which unregistered companies make. It also contended that the requirements as to registration contained in s. 332 of the Companies Act are so comprehensive that it would be contrary to public policy to allow an unregistered foreign company to enforce such a contract.

Held:

[1] There is nothing in the Companies Act which prohibits the making of the said contract, which is a contract for the construction and completion of a building. The Act also does not lay down any requirement which a foreign company must comply with before entering into such contract. There is, therefore, no sufficient nexus between the Companies Act and the said contract, Under s. 24(b) of the Contracts Act, the contract in question is a valid contract.

[2] The plaintiff had not registered itself pursuant to s. 332(1) of the Companies Act. Non-compliance with the requirement of that section merely opens the plaintiff to a penalty but does not affect the validity of the said contract.

[3] In the instant case, the object of the said contract was for the construction of a building in Penang. The said contract does not fall within any of the categories mentioned in *Theresa Chong v. Kim Khoon & Co.* [1976] 2 MLJ 253. Therefore the said contract is not opposed to public policy.

[Order made in terms of prayers (1) and (2) of application.]

Cases referred to:

Curragh Investments Ltd. v. Cook [1974] 1 WLR 1559
Asia Television Ltd. & Anor. v. Viwa Video Sdn. Bhd. [1984] 1 CLJ (Rep) 72
St. John Shipping Corporation v. Joseph Rank Ltd. [1957] 1 QB 267
Theresa Chong v. Kim Khoon & Co. [1976] 2 MLJ 253

Legislation referred to:

Companies Act 1965, ss. 332, (1), 349
Contracts Act 1950, ss. 24, (b), (c)

For the plaintiff - Robert Lazar; M/s. Shearn Delamore & Co.
For the defendant - Y.M. Chin; M/s. Allen & Gledhill

JUDGMENT

Zakaria Yatim J:

This is an application by the plaintiff by originating summons seeking the order of the Court-

(1) for a declaration that the contract dated 11 May 1982 and entered into between the plaintiff and the defendant was valid and effectual until such time as it was properly determined by either party notwithstanding the fact that the plaintiff was at all material times a company incorporated under the laws of Hong Kong and was not registered as a foreign company in Malaysia pursuant to the provisions of the Companies Act 1965;

(2) that Hopewell Construction Co. Limited is entitled to request president or vice-president for the time being of the Pertubuhan Akitek Malaysia to nominate an arbitrator pursuant to the provisions of Clause 34(1) of the conditions of the said contract, for the purposes of determining the disputes which have arisen between the parties as described in the notice of disputes contained in Hopewell Construction Co. Limited's.

The facts are not in dispute. The plaintiff is a company incorporated in Hong Kong. On 11 May 1982, the plaintiff entered into a contract (the said contract) for the construction of a building in Penang. Subsequent to entering the said contract, the plaintiff took possession of the building site on 1 October 1982. The plaintiff carried out certain works and was paid for the works carried out. Certain disputes then arose between the parties to the said contract.

The dispute before the Court now is whether the said contract is void because the plaintiff, being a foreign company, did not register itself in Malaysia as a foreign company pursuant to the provisions of the Companies Act 1965. With regard to the other disputes between the parties, the plaintiff wishes that these disputes be resolved by arbitration as in prayer 2, if the Court holds that the said contract is a valid contract.

The question for the Court to consider is whether the said contract entered into between the parties is a valid contract. Section 24 of the Contracts Act 1950 states,

> The consideration or object of an agreement is lawful, unless -
>
> ...
>
> (b) It is of such a nature that, if permitted, it would defeat any law;
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> ...
>
> ...
>
> (e) the Court regards it as immoral, or opposed to public policy.
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> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Mr. Chin, Counsel for the defendant, in his written submission referred to the various sections relating to foreign companies in the Companies Act. In particular, he referred to s. 332, which requires a foreign company to register itself with the Registrar of Companies within one month after it established a place of business or it commenced to carry on business within Malaysia. He also referred to s. 349 which provides a penalty for default by a foreign company in complying with, *inter alia*, s. 332. He submitted that the section which imposes a penalty must be taken to imply a prohibition of all unregistered foreign companies from carrying on business in Malaysia and consequently to prohibit by necessary inference, all contracts which unregistered companies make. He further submitted that the requirements as to registration contained in s. 332 of the Companies Act are so comprehensive that it would be contrary to public policy to allow an unregistered foreign company to enforce such a contract.

I shall first examine s. 24(b) of the Contracts Act and see whether the said contract between the parties is of such a nature that it would defeat the relevant provisions of the Companies Act. In order to render the said contract void there must be sufficient nexus between the provisions of the Companies Act and the said contract. This test was laid down by Megarry J, as he then was, in *Curragh Investments Ltd. v. Cook* [1974] 1 WLR 1559 at 1563. In his judgment in that case, Megarry J said,

> I accept of course, that where a contract is made in contravention of some statutory provision then, in addition to any criminal sanctions, the Courts may in some cases find that the contract itself is stricken with illegality. But for this to occur there must be a sufficient nexus between the statutory requirement and the contract. If the statute prohibits the making of contracts of the type in question, or provides that one of the parties must satisfy certain requirements (e.g. by obtaining a licence or registering some particulars) before making any contract of the type in question, then the statutory prohibition or requirement may well be sufficiently linked to the contract for questions to arise of the illegality of any contract made in breach of the statutory requirement. But it seems to me a far cry from that to the breach of statutory requirements which are not linked sufficiently or at all to the contract in question. There are today countless statutory requirements of one kind or another, yet I cannot believe that an individual or a company who is in breach of any of these requirements (for example, under the Factories Acts) is thereby disabled from making a legal contract for the sale of land or validity entering into covenants for title. To take an example that was mentioned in argument,

> I do not think that it could seriously be contended that every contract made by an English company, whether for the sale of land or otherwise, is illegal if, when it is made, the company is liable to prosecution and fine for failing to comply with some provision of the Act of 1948, for example, for not filing its annual returns in due time. Such a doctrine, for which I can see no justification, would result in chaos. If in the present case I assume that the vendor is in demonstrable breach of ss. 407 and 416, I am still quite unable to see how this provides any ground for contending that the covenants for title that the vendor must give will be impaired by illegality. The breach of the law and the covenants for title seem to me to be wholly unconnected.

The passage quoted above was cited with approval by the Federal Court in *Asia Television Ltd. & Anor. v. Viwa Video Sdn. Bhd.* [1984] 1 CLJ (Rep) 72. Abdoolcader FJ, as he then was, in delivering the judgment of the Court said,

> The correlation between the two legislative enactments must in our view depend on whether there is nexus between them. Mr. Davidson agrees in answer to a question we put to him that such a nexus is a necessary prerequisite and that the burden is on the respondents to establish this as between the two Acts. In *Curragh Investments Ltd. v. Cook* it was held that for a contract to be illegal as being made in contravention of some statutory provision there had to be a sufficient nexus between the statutory requirement and the contract, and that where statutory requirements were not linked sufficiently, or at all, to the contract no question of its illegality arose.

Applying the test laid down by Megarry J to the present case, the following questions have to be considered:- (a) whether the Companies Act prohibits the making of a contract of the type in question; and (b) whether the Companies Act provides that one of the parties must satisfy certain requirements before making such contract? In order to answer these questions it is necessary to look at the relevant provisions of the Companies Act.

Section 332(1) of the Companies Act provides that every foreign company shall, within one month after it establishes a place of business or after it commences to carry on business in Malaysia, must lodge with the Registrar of Companies for registration certain documents, including a certified copy of the certificate of its incorporation or registration in its places of incorporation or origin; a certified copy of its charter, statute or memorandum and articles; a list of its directors; notice of the situation of its registered office in Malaysia; and a statutory declaration made by the agent of the company. On payment of the appropriate fees and subject to the provision of the Act, the Registrar may register the company. Section 333 requires a foreign company to have a registered office in Malaysia. Section 334 states that on the registration of a foreign company, the Registrar shall issue a certificate, which is a *prima facie* evidence in all Courts of the particulars mentioned in the certificate. Section 349 provides that if default is made by any foreign company in complying with any provision under division 2 of the Act, which deals with foreign companies, the company is guilty of an offence under the Act and liable to pay a default penalty.

I find nothing in the Companies Act which prohibits the making of the said contract in question, which is a contract for the construction and completion of the E and O Complex in Penang. The Act also does not lay down any requirement which a foreign company must comply with before entering into such contract. There is, therefore, no sufficient nexus between the Companies Act and the said contract. In my opinion, under s. 24(b) of the Contracts Act, the contract in question is a valid contract.

Mr. Chin quoted extensively the judgment of Devlin J in *St. John Shipping Corporation v. Joseph Rank Ltd.* [1957] 1 QB 267 in support of his argument that the contract in question is not a valid contract. But the decision in that case does not support his argument.

In that case Devlin J decided:

> that the infringement of a statute in the performance of a contract which was legal when made did not render the contract illegal unless the contract, as performed, was one which the statute meant to prohibit, and that, on a true construction of the Act of 1932, having regard to its scope and purpose, contracts for the carriage of goods were not within the ambit of the statute at all so that the plaintiff's infringement of ss. 44 and 57 did not prevent them from suing on the contract.

Mr. Chin also referred to Clause 4 of the conditions of the said contract. The clause, *inter alia*, states that "The contractor shall comply with ... any written law applicable to the territory or territories of Malaysia in which the works are to be carried out." According to Mr. Chin, this clause amounts to a condition precedent which must be fulfilled by the plaintiff. I agree with him that under this clause the plaintiff must comply with all written laws including the requirement for the plaintiff to be registered as a foreign company. But non-compliance with Clause 4 is only a breach of the condition in that clause and such non-compliance does not render the said contract a nullity.

Mr. Robert Lazar, Counsel for the plaintiff contended that the plaintiff did not register itself pursuant to s. 332(1) of the Companies Act. According to him, non-compliance with the requirement of that section merely opens the plaintiff to a penalty but does not affect the validity of the said contract. In my view, Mr. Lazar's submission is correct.

The next question for the Court to consider is s. 24(e) of the Contracts Act, that is, whether the contract in question is opposed to public policy. The categories of agreements which are opposed to public policy under s. 24(e) have been enumerated by the Federal Court in *Theresa Chong v. Kim Khoon & Co.* [1976] 2 MLJ 253, Gill CJ (Malaya) in his judgment at p. 256 stated as follows:

> It is to be observed that s. 24 deals with such consideration and objects of a contract as are unlawful and therefore illegal. This section is in *pari materia* with s. 23 of the Indian Contract Act. Pollock and Mulla on the Indian Contract Act (8th Edn) in its commentary on s. 23 under the heading "Opposed to Public Policy" says this:
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> The general head of public policy covers, in English law, a wide range of topics. Agreements may offend against public policy by tending to the prejudice of the State in time of war (trading with enemies, etc.), by tending to the perversion or abuse of municipal justice (stifling prosecutions, champerty and maintenance) or, in private life, by attempting to impose inconvenient and unreasonable restrictions on the free choice of individuals in marriage, or their liberty to exercise any lawful trade or calling ... It is now understood that the doctrine of public policy will not be extended beyond the classes of cases already covered by it. No Court can invent a new head of public policy.

In the instant case, the object of the said contract was for the construction of a building in Penang. The said contract does not fall within any of the categories mentioned in the judgment of the learned Chief Justice in the passage quoted above. I, therefore, find that the said contract is not opposed to public policy.

For the reasons stated above, I make an order in terms of prayers (1) and (2) of the application.

Also found at [1986] 2 CLJ 299